In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 21

MANDAYA THOMAS

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

Appeal by prosecution against sentence - Whether sentence is manifestly inadequate- Importation of controlled substance Acetyl Fentanyl contrary to section 4(3) of the Misuse of Drugs Act 1972- Legal principles governing suspended sentences under section 70K of the Criminal Code- Test for interfering with exercise of judicial discretion- Meaning of Basic Sentence- Inapplicability of Section 27B to Acetyl Fentanyl

Date of Hearing: 13 November 2019
Date of Judgment: 07 January 2020

Mr. Marc Daniels, (Marc Geoffrey Ltd) for the Appellant
Ms. Jaleesa Simons, (On behalf of the Director of Public Prosecutions) for the Respondent

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. This is an appeal by the Crown against sentence on the ground that the sentence imposed was manifestly inadequate.

2. On 29 March 2018 the Respondent, a female Bermudian national, was convicted in the Magistrates' Court on a retrial for importation of 1.45 grams of the controlled drug

cannabis and 92 grams of the controlled drug acetyl fentanyl, contrary to section 4(3) of the Misuse of Drugs Act 1972 ("the MDA"). The retrial was ordered by the then learned Chief Justice, Mr. Ian Kawaley, who quashed the first conviction in *Mandaya Thomas v The Queen [2017] SC (Bda) 59 App (28 July 2017)*).

3. Having been unsuccessful before me in her second appeal against conviction, the Respondent was remitted to the Magistrates' Court to be sentenced. In respect of the cannabis, a term of 90 days imprisonment was imposed. The target of the Crown's appeal, however, is on the 4 ½ year prison sentence which was passed for the second count related to the acetyl fentanyl.

4. In passing the 4 ½ year term of imprisonment, the learned magistrate, Mr. Khamisi Tokunbo, suspended 4 years of the 4 ½ year total leaving the Respondent to serve an immediate term of 6 months' imprisonment. A two year probation term was also imposed.

The Relevant Law

Suspended Sentences

5. Section 70K(1) of the Criminal Code empowers the Court to suspend a prison sentence of 5 years or less. The section expressly requires a Court to be 'satisfied' that it is 'appropriate to do so in the circumstances' before granting the suspension. The section provides:

"*Suspended sentence of imprisonment*
70K (1) If a court sentences an offender to imprisonment for 5 years or less it may order that the term of imprisonment be suspended in whole or in part during the period specified in the order ("the operational period"), which period shall not exceed 5 years, if the court is satisfied that it is appropriate to do so in the circumstances.

(2) A court shall not make an order under subsection (1) if it would not have sentenced the offender to imprisonment in the absence of power to make an order suspending the sentence."

6. In my previous judgment in *Tafari Wilson [2019] SC (Bda) 2 App (10 December 2018)* I reviewed the legislative background to Bermuda and English case law for guidance on how the Court's discretionary powers to order a suspended sentence should be exercised.

7. In summary, section 70K repealed section 56A of the Criminal Code. Section 56(1), on its literal construction, bestowed an unfettered discretion on the Courts to order a suspended sentence:

"*…a court which passes a sentence of imprisonment for a term of not more than two years for any offence may order that the sentence shall not take effect unless, during the period specified in the order, being not less than one year and more than two years from the date of the order, the offender commits in Bermuda another offence for which he is sentenced to imprisonment, and thereafter a court having power to do so orders under section 56B that the original sentence shall take effect*."

8. The history on the statutory position in the UK was traced back to s 22(2) of the Powers of Criminal Courts Act 1973. Subsections (1) and (2) provided:

"*22 (1) Subject to subsection (2) below, a court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than two years from the date of the order, the offender commits in Great Britain another offence punishable with imprisonment and thereafter a court having power to do so orders under section 23 of this Act that the original sentence shall take effect; and in this Part of this Act "operational period", in relation to a suspended sentence, means the period so specified.*

(2) A court shall not deal with an offender by means of a suspended sentence unless the case appears to the court to be one in which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under subsection (1) above."

9. Section 22(2) (like section 56A of the Bermuda Criminal Code) empowered the Courts to order a suspended sentence without any express restrictions as to how such a discretionary power was to be exercised.

10. Section 5(1) of the UK Criminal Justice Act 1991 substituted s 22(2) of the Powers of Criminal Courts Act 1973. Section 5(1) (unlike any provision in Bermuda, past or present) expressly required 'exceptional circumstances' to justify the imposition of a suspended sentence:

"*A court shall not deal with an offender by means of a suspended sentence unless it is of the opinion – (a) that the case is one in which a sentence of imprisonment would have been appropriate even without the power to suspend the sentence; and (b) that the exercise of that power can be justified by the* ***exceptional circumstances*** *of the case*."

11. Section 5(1) of the UK 1991 Act was repealed and the current statutory powers of the Courts in the UK to impose a suspended sentence appears at section 189(1)[1] of the

[1] Section 189(1) came into force in the UK on 3 December 2012

Criminal Justice Act 2003 which removed the exceptional circumstances test and restored the broad unfettered powers to the UK Courts. Section 189(1) reads:

"*189 Suspended sentences of imprisonment*
[(1) If a court passes a sentence of imprisonment for a term of (at) least 14 days but not more than 2 years, it may make an order providing that the sentence of imprisonment is not to take effect unless-

(a) during a period specified in the order for the purposes of this paragraph ("the operational period") the offender commits another offence in the United Kingdom (whether or not punishable with imprisonment), and
(b) *a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect*."

12. So, in summary of the UK statutory amendments, section 22(2) of the Powers of Criminal Courts Act 1973 gave the UK Courts unrestricted discretionary powers to suspend a prison term within the stated range. This was followed by section 5(1) of the UK Criminal Justice Act 1991 which expressly called for 'exceptional circumstances'. Now, the statutory powers under section 189(1) of the Criminal Justice Act 2004 are as broadly stated as they were originally drafted under section 22(2).

13. At paragraph 31 of the *Tafari Wilson* judgment, I made the following observation in comparing the UK and Bermuda legislation:

The former Bermuda Criminal Code provision under s. 56A(1) was, in relevant part, a direct lift from the now repealed UK section 22(2) of the Powers of Criminal Courts Act 1973. It is, therefore, unsurprising that the Bermuda case law took to the same approach to suspended sentences as the UK case law. During the operative period of section 5(1) of the UK Criminal Justice Act 1991 which specified the requirement for exceptional circumstances, the Bermuda case law continued to mimic the English case law approach which embraced the requirement for exceptional circumstances prior to and during the operative period of section 5(1) of the 1991 UK Act. Equally, the reported Bermuda case law position, dating back to 1989, latched on to the requirement for exceptional circumstances to justify a suspended sentence. This requirement was unchanged by section 70K of the Bermuda Criminal Code as seen by the 2004 Court of Appeal decision delivered by Evans JA in The Queen v Gregory Millington Johnson (supra) which relied only on previous case law pre-dating the introduction of section 70K.

14. In the English Court of Appeal decision in *R v Carneiro [2007] EWCA Crim 2170*, Toulson LJ described the proper approach to the decision to suspend a sentence of imprisonment by reference to the broadly stated powers given under section 189(1) of

the Criminal Justice Act 2004 which removed the 'exceptional circumstances' test from the previous enactment:

15. *"[15] There is no absolute embargo on a judge suspending a sentence for an offence of this kind if there is proper ground to do so, nor is there any statutory requirement that there should be exceptional circumstances. However, once it is recognised that ordinarily the appropriate sentence for an offence of this kind does involve immediate custody, there has to be some good reason for the judge to at differently in a particular case for simple reasons of consistency*."

16. Defence Counsel appearing before Kawaley CJ in *Miller v Crockwell [2012] Bda LR 56* urged the Court to approve the Carneiro 'good reason' test. At page 9 of the *Miller v Crockwell* judgment Kawaley CJ stated:

"*… I agree, subject to one important caveat.*

The courts may set down sentencing guidelines for specific categories of cases which mandate the imposition of immediate custodial sentences save in exceptional cases. Such guidelines have been laid down in relation to, inter alia, offences involving serious violence in cases such as R v Johnson [2004] Bda LR 63 (CA). It is true that such cases can be read as suggesting, more broadly, that exceptional circumstances are always required to justify suspending a custodial term. But in my judgment such an interpretation of those cases is not supported by a straightforward construction of section 70K of the Criminal Code; nor is it supported by more recent and highly persuasive authority English Court of Appeal authority.

Accordingly, I find that the suspension test found in section 70K(1) of the Criminal Code – whether "it is appropriate to do so in the circumstances"- is not a rigid test at all but depends on the circumstances of the case. If the offence is one for which an immediate custodial sentence is the only appropriate sentence irrespective of standard mitigating circumstances, then exceptional circumstances are required for suspending the expected sentence. Thus in R v E [2008] EWCA Crim 91, the English Court of Appeal found that for offences in relation to which a custodial sentence "inevitable", exceptional circumstances must be found to justify a suspension (paragraph [18]). If, on the other hand, the offence falls into the category of offence where an immediate custodial sentence is appropriate (but not essential) and the sort of sentence which ordinarily would be imposed, then "there has to be some good reason for the judge to act differently in a particular case for simple reasons of consistency": R v Carneiro [2007] EWCA Crim 2170.

The bar for what constitutes "good reason" may be lower still if the sentencing judge determines that an immediate custodial sentence is appropriate for a particular offender in circumstances where there is no established sentencing tariff according to which an immediate custodial sentence would "ordinarily" be imposed at all. Ms

Mulligan for the sentencing appeal Appellant was bound to concede that she had found no judicial precedents capable of supporting an established practice of imposing immediate custodial terms on offenders under 21 years of age at the time of committing offences similar to that for which the Respondent was convicted…"

17. In *R v Tafari Wilson*, I agreed with the above reasoning. Kawaley CJ drew a crucial distinction between two classes of offences. The first category applies to offences where the *only* appropriate offence is an immediate custodial sentence. In this first class, exceptional circumstances were required for suspending the expected sentence. The reasoning was that the Court had to be satisfied under section 70K that the suspension of a prison term was appropriate in the circumstances. Applying this analysis, in circumstances where the genre of offence calls only for an immediate custodial offence, the Court could not properly be satisfied that a suspended sentence would be appropriate without exceptional circumstances justifying the suspension. The second category pertained to offences where it would be appropriate but not essential to impose an immediate custodial sentence. In this second class of offences, the *R v Carneiro 'good reason'* test applied. This, I say, was the thrust of Kawaley CJ's analysis in *Miller v Crockwell*.

18. However, it was common ground between Counsel that *Miller v Crockwell* was overturned by the Bermuda Court of Appeal in *The Queen v Garth Bell [2016] Bda LR 104* where the test is correctly stated. In the unanimously agreed judgment of the upper Court, Baker P rejected Kawaley CJ's analysis in *Miller v Crockwell* as follows:

    The requirement for exceptional circumstances to suspend the sentence was never a statutory one in Bermuda, although it was applied in practice by the Bermuda courts for a number of years. Having considered the authorities, we are satisfied that such a gloss should not be put on the interpretation of section 70K. The section says the Court can impose a suspended sentence if it is satisfied it is appropriate to do so in the circumstances. We adopt the words of Toulson LJ in Carneiro which seem to us to be equally applicable in this jurisdiction.

19. It is regrettable that Counsel appearing in *R v Tafari Wilson* did not refer me to the *Garth Bell* decision which is binding on this Court. Notwithstanding, the Court of Appeal in *Garth Bell* disapproved of the *Miller v Crockwell* analysis as an approach to the interpretation of section 70K and imposed the *Carneiro* 'good reason' test in its place. This is therefore to be regarded as the correct interpretation of section 70K.

20. Respectfully and humbly, I would say, both the *Carneiro* 'good reason' test and the overturned 'exceptional circumstances/good reason' *Miller v Crockwell* test bring about the same result. What constitutes a good reason is likely to be of a more exceptional nature for offences where the *only* appropriate offence is an immediate custodial sentence. Kawaley CJ unequivocally embraced the approved *Carneiro* 'good reason' test for offences where a custodial sentence is appropriate but not essential.

The Basic Sentence

21. Under section 27(1)(b) of the MDA a person convicted by a summary court for importation of a controlled drug is liable to imprisonment for 10 years and/or to a fine of $500,000 or such sum amounting to three times the street value of the substance, whichever is greater.

22. The term 'the basic sentence' is drawn from the MDA and refers to the appropriate sentence in accordance with established sentencing principles but without regard to any statutory discounts or uplifts prescribed by sections 27A, 27B or 27E.

23. Crown Counsel relied on the judgment of Baker P for the Bermuda Court of Appeal in *JR v The Queen [2018] Bda LR 83* in support of her contention that acetyl fentanyl offences attract at least the same kind of basic sentence as diamorphine (heroin) offences. In the *JR* case, the appellant pleaded guilty to the offence of conspiracy to import a controlled drug, having ingested 45 pellets of fentanyl prior to her arrival in Bermuda aboard a commercial flight from Toronto, Canada. The precise weight of the drugs was unknown since 44 of the pellets were unrecovered. The remaining one pellet burst inside of the appellant, which eventually led to her hospitalization and arrest.

24. At first instance, Wolffe AJ held that fentanyl was so potent that it required a higher class of sentencing than heroin and cocaine so to send a clear message out to those who might otherwise partake in the supply of the drug. The learned judge set the starting point at 18-21 years, following the decision in *Smith [2005] Bda LR 13* where the same starting range was set for 339.6 grams of diamorphine. Having considered the mitigating factors present, the basic sentence was held to be 10-12 years. (Notably, Wolffe AJ did not expressly use the term 'basic sentence' but the Court of Appeal accepted that the 10-12 year range came within the meaning of the term.) It should also be said that the Court of Appeal were focused on the applicability of section 27E (discount rewards for assistance given to the investigation or prosecution of any offender) in the *JR* case. No disputes arose on the issue of the basic sentence.

Section 27B Uplift does not apply to Acetyl Fentanyl

25. Section 27B of the MDA compels the sentencing judge to impose a 50% uplift on the basic sentence for an offence involving a Schedule 5 controlled drug. It reads:

Controlled drugs and increased penalty
27B In sentencing a person convicted for an offence involving a controlled drug prescribed under Schedule 5, the court shall have regard to—

(a) the street value of the controlled drug; and
(b) the destructive effect on society of the controlled drugs prescribed under Schedule 5;
and add an increased sentence of fifty per cent to the basic sentence.

[Section 27B inserted by 2005:26 s.8 effective 4 August 2005]

26. As observed by the Court of Appeal in the *JR* judgment at para 6, fentanyl is not listed under Schedule 5:

"…*Fentanyl is, surprisingly, not a drug listed in schedule 5 as requiring a mandatory uplift of 50% to the basic sentence. This oversight no doubt exists by reason of fentanyl's recent emergence on the dangerous drugs scene, but the omission is clearly one that should be rectified*."

27. To date, neither fentanyl nor acetyl fentanyl is listed under Schedule 5 of the MDA.

Analysis and Decision

28. The prosecution argued that the suspension of 4 years from the 4 ½ year sentence rendered the sentence manifestly inadequate.

29. But for the suspension imposed, Ms. Simons eventually accepted that she would not otherwise argue the 4 ½ year prison sentence to be manifestly inadequate. This concession, which came during the hearing before me, was a significant and perhaps unintentional departure from the Crown's written submissions where it is complained that the learned magistrate erred in fixing the basic sentence at 3 years' imprisonment and that such a sentence was inconsistent with section 27 of the Act.

30. Notwithstanding, I will address complaints made in the Crown's written submissions on the subject of the basic sentence. Firstly, the prosecutor says that the learned magistrate wrongly allowed the novelty of acetyl fentanyl as a controlled drug to stand as a mitigating factor. She also argued that the magistrate erred in distinguishing and disregarding the ranges set in previous cases in the Supreme Court.

31. What the learned magistrate said was this:

"…*The question in this case, given all the circumstances, what that sentence must be. Having regard to the nature of the drug and the fact that it is new on the market, I'm inclined to agree with counsel for the Defendant, that the basic starting point should be one of three years imprisonment and that there should be an uplift of 50% which being an additional 18 months on Count 2 for the acetyl fentanyl, making that sentence 4 ½*

years. For count 1, the cannabis, for importation- 90 days. Both sentences to run concurrent."

32. It does not appear to me on the wording of Magistrate Tokunbo's judgment that the newness of the drug was considered to be a mitigating factor. In fact, what the learned magistrate appears to have done is wrongly applied an uplift of 50% under section 27B to the basic sentence of 3 years. Acetyl fentanyl is not listed under Schedule 5 and so it is not subject to the statutory uplift, as unfortunate as that fact may be.

33. The Crown submitted at the sentence hearing in the Magistrates' Court that the appropriate range of sentence would be 5-8 years imprisonment. Ms. Simons argued at the appeal that the basic sentence ought to have been 5 years leading to a final sentence of 7 years, presumably by importing a s.27B statutory uplift which does not apply.

34. I accept the Crown's submission that the appropriate starting range of sentence for the importation of 92 grams of the controlled drug acetyl fentanyl (yielding a street value up to $270,480.00) is 5-8 years in the Magistrates' Court, keeping in mind that the maximum sentence is 10 years imprisonment at summary jurisdiction. This starting range accounts for the lethal effect of acetyl fentanyl and the need for the Courts to treat offences involving this drug as seriously as the controlled drug heroin.

35. The formation of the basic sentence will depend on the aggravating and mitigating factors in accordance with established sentencing principles. In this case, the offender had no previous convictions and was deemed unlikely to reoffend. Quite rightly, she was not given credit for a guilty plea, albeit that she admitted to the importation of the substance at the airport. (The points challenged at her trials were focused on the legal question as to whether acetyl fentanyl came within the meaning of a controlled drug under the MDA).

36. In these circumstances, the Crown pursued a basic sentence of 5 years' imprisonment. In my judgment a 3 year basic sentence is not appropriate in this case. However, given that there was no lawful justification for a 50% statutory uplift from the 3 year basic sentence, I would consider a 4 ½ year term to be an appropriate basic sentence. This is a very modest shortfall of what the Crown sought, as Mr. Daniels keenly pointed out in his oral arguments. For these reasons, I see no reason to interfere with the 4 ½ year sentence.

37. Before I return to the subject of the suspension, I deem it important to repeat the concerns of the Court on the current omission of acetyl fentanyl from the relevant sections of the MDA.

38. The reported date of the *JR* judgment from the Court of Appeal where a recommendation was made for an amendment to the Act to include fentanyl in the

Schedule 5 list for the section 27B 50% sentence uplift is 14 August 2018. Regrettably, no such legislative amendments have been made to date.

39. In my earlier judgment of 19 February 2019 where I dismissed the second appeal against conviction I held, as a matter of statutory construction, that acetyl fentanyl came within the meaning of the term '*any compound structurally derived from fentanyl'* under Part I of Schedule 2 of the Act since it would necessarily include chemical synthetic processes which produce a substance or product structurally analogous to fentanyl.

40. I would agree that an express inclusion of acetyl fentanyl to the list at paragraphs (e)(iv) of Part I of Schedule 2 and to Schedule 5 would be helpful in sending a clearer message to the public that acetyl fentanyl will be treated by the Courts as seriously (if not more so) as the other substances named in those lists.

41. I now return to the question of the suspension of 4 years of the 4 ½ year prison term. The imposition of a suspended sentence is an exercise of judicial discretion. The test for an appellate Court's interference with the exercise of judicial discretion is long established and well-known law. In *Evans v Bartlam [1937] AC 473* Lord Wright stated:

"*It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong*."

42. A broader selection of judicial remarks outlining the strict boundaries to safeguarding the exercise of judicial discretion is to be found in the Court of Appeal judgment *Intercontinental Natural Resources Ltd v Conyers Dill & Pearman [1982] Bda L.R. 1*.

43. The learned magistrate cannot be said to have disregarded the 'good reason' test (as stated in the *Carneiro* case and approved by the Court of Appeal in the *Garth Bell* case). If anything, it might be said that he erred on the side of caution by characterizing the reasons for suspending the Respondent's sentence as 'exceptional'. I accept that the passage of time which lapsed between the date of the offence and the sentence hearing (notwithstanding that the Respondent was unsuccessful in the second appeal) in addition to the her more recent personal developments which included the birth of a new baby and a serious road traffic accident were all proper considerations for the magistrate to have regard to in deciding whether to suspend the sentence. I also find that the newness of the drug acetyl fentanyl to Bermuda was probative of the Respondent's contention that she was unaware of the extent of serious harm related to the drug. The magistrate was entitled to consider this point as part of the 'good reason' test he rightly applied. For this reason I do not think it right to interfere with the learned magistrate's exercise of discretion in allowing the suspension of 4 years of the sentence for 2 years.

44. Mr. Daniels was correct in his emphasis that the Court must consider the global sentence imposed in its determination as to whether the sentence was manifestly inadequate. The Respondent was sentenced to 4 ½ years' imprisonment in addition to 2 years of probation.

45. In all the circumstances I do not consider the sentence to be manifestly inadequate.

Conclusion

46. For these reasons I dismiss the appeal against sentence.

Dated this 7th day of January 2020

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HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE